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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,
v.
DARRYL COVINGTON, *et al.*,
Respondents.

Reply to Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

This case raises fundamental questions concerning what legal standards should apply in calculating hourly rates in federal fee-shifting litigation. The important context in which these questions arise is that of private, for-profit attorneys who seek rates in excess of those they have ever been able to command in the marketplace. The Circuits have adopted conflicting legal standards to resolve these questions. The D.C. Circuit has adopted the most generous standards in the country -- *Laffey* matrix or no *Laffey* matrix. Unlike the other Circuits, it permits such hourly rates to be awarded merely because other counsel in other sorts of cases command such rates in the marketplace and because counsel state that they have charged lower rates for public-spirited reasons. The D.C. Circuit thus permits above-market rates to be awarded, rates which are indistinguishable from prohibited contingency enhancements.

In this Reply, the District first addresses certain factual inaccuracies in the Opposition, but this should not obscure the fundamental legal issues presented by this Petition. It then addresses the serious conflict among the Circuits on these issues and the conflict between the decision below and the decisions of this Court.

I. *LAFFEY*-MATRIX RATES ARE PREMIUM RATES.

Respondents urge that the District of Columbia is mistaken in its argument that *Laffey*-matrix rates are premium rates for three reasons: (1) the district court in *Laffey* did not award the very highest rates charged by some attorneys in the District; (2) *Laffey*-matrix rates have routinely been awarded by courts in the District; and (3) the rates in the matrix are lower than those charged by lead defense counsel in several investigations under the Ethics in Government Act. See Opp. 3-5. These criticisms are unfounded.

First, it was the district court in *Laffey* which underscored that the matrix rates were premium rates to be awarded only to counsel of superior skill and reputation. Not only did that court characterize lead counsel in that case as attorneys of "extraordinary experience and expertise" and the *Laffey*-matrix rates as "generous" even for them, but when a *Laffey* attorney was not a luminary, it reduced the matrix rate by *one-third*. *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 374 (D.D.C. 1983).

Second, the fact that trial courts in the District recently have been routinely awarding *Laffey*-matrix rates upon request does not prove that these rates are market rates for attorneys like those here, rather than premium rates. What it does prove is that, contrary to respondents' arguments elsewhere in their Opposition, the *Laffey* matrix has become not merely the starting point for determining hourly rates in federal fee-shifting litigation, but the only point.

Third, the Ethics in Government Act cases cited by respondents, in which lead counsel were awarded rates higher than *Laffey*-matrix rates, are easily distinguishable. Those attorneys are widely regarded not merely as legal luminaries but as "supernovas," and they were engaged in representing the highest officials of this country in very high-stakes criminal cases. One cannot reasonably compare counsel and the cases here with Theodore Olson, who represented former White House Chief of Staff Donald T. Regan in *In re North (Regan Fee Application)*, 1995 U.S. App. LEXIS 36364 (D.C. Cir. Dec. 22, 1995)); with Griffin Bell, who represented

President Bush in *In re North (Bush Fee Application)*, 59 F.3d 184 (D.C. Cir. 1995); or with Lloyd Cutler, who represented former Secretary of State George P. Shultz in *In re North (Shultz Fee Application)*, 8 F.3d 847 (D.C. Cir. 1993). Nor can one infer from the hourly rates awarded to these extraordinary attorneys ($400.00, $337.50, and $370.00) in these extraordinary criminal investigations that the *Laffey*-matrix rates awarded to lead counsel here ($260.00) are merely mid-range rates, as respondents contend (Opp. 3).

II. The Fee Awards Here Rest On The *Laffey* Matrix Which Has Been Rigidly Applied By Courts In The District Of Columbia In Recent Cases.

Respondents urge that the courts in the District of Columbia have not in recent cases been rigidly applying the *Laffey* matrix. They also urge that the District's market-rate evidence was properly ignored because it addresses fees charged by solo practitioners and small firms in cases like these and because two of its examples were outdated. Neither argument has merit.

The first argument is belied by respondents' own presentation of the facts. Thus, in their page-long footnote 3 (Opp. 3-4), which they proffer in an attempt to reassure this Court that the *Laffey* matrix must be reasonable because it has been widely accepted, they list some 11 cases in which the matrix has been mechanically applied. Furthermore, in their 12-bullet-point discussion of the so-called extensive evidence in *Covington* (Opp. 8-9), 11 of these points are based on the *Laffey* matrix or one of its updates.[1] Finally, in support of their argument that "district courts have demonstrated that they will not award matrix rates to attorneys they believe could not command such rates in the market," (Opp. 20) respondents cite only one case -- the original *Laffey* decision!

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[1]The only non-*Laffey*-matrix evidence cited is "A Sampler of Law Firm Billing Rates," published by the *Legal Times*, which contains hourly rate information for 1989, 1990, and 1991 for lawyers at 12 large law firms in the District. Opp. 9. In this sampler, rates ranged from $165.00 to $420.00 for partners. J.A. (I) 184. Given this data base, the sampler cannot possibly be evidence that the time of a solo practitioner or a partner in a small firm, who charges, for example, a maximum hourly rate of $150.00, has a true market value of $260.00 per hour.

The second argument is belied by respondents' own evidence. Thus, prevailing counsel here were all attorneys in small firms or solo practitioners and, as a consequence, there is no need to discount evidence of what such attorneys charge in cases like those here. Furthermore, evidence of contemporaneous market rates for Mr. Bennett and Mr. Adler, with practices similar to counsel here, *was supplied by the respondents themselves*. They submitted a 1991 affidavit by Mr. Bennett (and identical affidavits by three other attorneys) in which he averred that "[i]t is common for law firms to raise their rates at least $10 per year" and "[t]hat has certainly been the case for my law practice." J.A. (I)141-42.[2] If $10.00 per hour is added to Messrs. Bennett's and Adler's market-based 1987 hourly rate of $135.00, their market-based rate for 1992 would have been $185.00. The applicable *Laffey*-matrix rates would have been either $290.00 or $300.00 for Mr. Adler, and either those rates or $250.00 or $260.00, for Mr. Bennett. See Pet. 8 n.2.

III. There Is A Conflict Among The Circuits Over The Meaning of *Blum's* Footnote 11.

Respondents assert that the District, as well as the Third Circuit, errs in stating that there is a conflict among the Circuits over how to interpret *Blum's* footnote 11 (*Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984)) and that all the decisions cited in its Petition, as well as in *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) ("*SPIRG*"), "used the same method to determine lodestar fees." Opp. 23. For the reasons that follow, these assertions are wrong. Thus, the decision below is squarely in conflict with *Barrow v. Falck*, 977 F.2d 1100 (7th Cir. 1992); *Shakopee Mdewakanton Sioux Community v. Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); and *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992).

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[2]Mr. Bennett's affidavit, and the three identical affidavits, persuaded the district court in *Robles v. United States*, Civil Action No. 84-3585, 1992 U.S. Dist. LEXIS 142 (D.D.C. Jan. 10, 1992), to increase the *Laffey*-matrix rates by $10.00 annually. J.A. (I) 131 & 134 n.7.

Here, for example, in the *Covington* case, lead counsel, whose customary hourly rates have never exceeded $150.00, were awarded $260.00 based on evidence that some other attorneys with 11 to 19 years of experience may charge that higher rate in other types of cases. Neither the Seventh nor the Eighth Circuit would have permitted this award. To paraphrase Judge Easterbrook in *Barrow*: "Perhaps *other* attorneys . . . have market rates in the range of $260.00; rates vary with the skill and the time a lawyer needs to accomplish a task. But *the attorneys representing the Covington plaintiffs* had a market rate of $150.00 or less." 977 F.2d at 1105. In *Shakopee*, in turn, the Eighth Circuit reversed an hourly rate of $100.00, despite evidence that other attorneys charged between $100.00 to $125.00, and awarded $70.00, which constituted the attorney's own customary rate and thus "represent[ed] counsel's own valuation of his work," and which was also "comparable to general rates charged for similar work . . .." 771 F.2d at 1160.[3]

The decision below is also in conflict with *Davis* (and numerous other cases) in rejecting the common sense proposition that the market for legal services, especially the market in major metropolitan areas, contains specialties or submarkets, including a civil rights plaintiffs bar. Indeed, in *Davis*, the Ninth Circuit ruled insignificant an hourly-rate survey, similar to that in *Laffey*, "which discussed a wide variety of practice areas." 976 F.2d at 1547. *Davis* is also inconsistent with *Barrow* insofar as it awarded fees at rates charged by attorneys other than the prevailing attorneys in the case.

The conflict among the Circuits can be illustrated in a slightly different context -- that in which prevailing counsel seek their customary rates and defendants urge that these rates are higher than market rates. The Seventh Circuit has adopted an opportunity-cost approach in which counsel are ordinarily entitled to their customary

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[3]The depth of the conflict among the Circuits is illustrated by the fact that in *Shakopee*, the Eighth Circuit expressly followed the D.C. Circuit's billing-rate, or opportunity-cost, approach in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 24 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), an approach which was overturned by the Circuit *en banc* in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. 1988) ("*SOCM*").

rates. *See, e.g., Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995) (reversing award of hourly rates less than counsel's customary rates, which had been set because few persons would be willing to pay $275.00 per hour to recover $1,000.00, because, "[i]n order to encourage able counsel to undertake" cases under Fair Debt Collection Practices Act, "as congress intended, it is necessary that counsel be awarded fees commensurate with those which *they could obtain by taking other types of cases*") (emphasis added); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993) (remanding case in which district court had declined to award customary rate; ruling that an attorney's opportunity cost is his presumptive market rate; and stating that a rate lower than an attorney's customary rate is proper only if an attorney's "market-clearing price" is less than that rate). By contrast, the Tenth Circuit has adopted a common sense submarket approach in which an attorney is not entitled to his customary rate if it exceeds the rate charged by counsel in similar cases. *See Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994) (attorney who can command $200.00 per hour in his general civil rights litigation practice is entitled to only $125.00 per hour in a case brought under the Individuals with Disabilities Education Act because the lower rate is the rate charged by comparable counsel in IDEA litigation and thus is the market rate in IDEA cases).

In short, there is a square conflict among the Circuits over the *legal standards* to be used in determining the market rates to be awarded prevailing counsel in federal fee-shifting litigation. And, although this Court in *City of Burlington v. Dague*, 505 U.S. 557 (1992), eliminated one of the four approaches identified by the Third Circuit in *SPIRG*, at least three others remain. *See* Pet. 23-30; *see also* AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION 20-21 & n.92, Federal Judicial Center (1994) (noting conflict between Seventh and Ninth Circuits and Seventh Circuit's disagreement with *SOCM*).

IV. THE DECISION BELOW IS IN CONFLICT WITH *BLUM* AND *DAGUE* BECAUSE IT DOES NOT REFLECT THE MARKET AND RESULTS IN WINDFALLS FOR ATTORNEYS.

In *Blum, Dague*, and its other federal fee-shifting cases, this Court has attempted to chart a reasonable and steady course in

rather choppy waters. It has recognized that federal fee-shifting statutes radically alter the marketplace for legal services by enabling persons with meritorious claims to secure counsel they otherwise would not, or could not. At the same time, however, it has sought to craft rules that otherwise reflect the market; do not generate excessive fee litigation; and result in fee awards that are adequate to attract competent counsel but do not result in windfalls to attorneys. These purposes are sometimes at odds with each other. Thus, for example, although counsel representing clients in non-fee-shifting litigation on a contingent-fee basis may command a premium for their services above their customary hourly rates, this Court in *Dague* ruled that contingency enhancements in fee-shifting litigation would more often distort the market for legal services rather than reflect it.

Footnote 11 in *Blum* constitutes this Court's initial -- and so far only -- attempt to provide guidance on the important issue of how to calculate a reasonable hourly rate for the lodestar in cases brought under federal fee-shifting statutes. Footnote 11, when read in light of the purposes of these statutes and the policies this Court has identified as important in interpreting them, requires the conclusion that the decision below is wrong. Thus, although the decision may promote fee simplification, it distorts the market for legal services and results in fee awards well in excess of those necessary to attract competent counsel.

In footnote 11, this Court recognized that hourly rates vary widely because of market forces, which take into account the fact that the experience, skills, and reputations of attorneys vary widely. This Court also recognized that the customary rate or rates charged by attorneys are presumptively their market rates. As applied here, footnote 11 required only a rather simple inquiry. In *Covington*, for example, the highest customary hourly rate of lead counsel was $150.00 and this rate was in line with rates charged by comparable counsel in similar cases. *See* Pet. 7-8 & n.2. It was thus lead counsel's market rate.

Nevertheless, the D.C. Circuit awarded an hourly rate of $260.00 based on the *Laffey* matrix. The D.C. Circuit did so even though the *Laffey* matrix treats all attorneys in the District with 11

to 19 years of experience as fungible and even though it was designed to help establish market rates for counsel of superior skill and reputation in a particularly complex class action. And the D.C. Circuit did so even though counsel in the three cases before it had never commanded *Laffey*-matrix rates in the marketplace and even though their clients could have secured (and, in fact, did secure in *Sexcius*) counsel at rates much lower than *Laffey*-matrix rates.

The D.C. Circuit's decision ignores two basic principles. First, the purposes of federal fee-shifting statutes do not include ensuring that attorneys litigating cases under them receive hourly rates that are comparable to those garnered by attorneys at prestigious firms. Second, a competitive market, including a competitive market for legal services, should exert downward, not upward, pressures on price. The result of the D.C. Circuit's decision is a windfall for attorneys at the expense of the public.

This can be illustrated by two examples. The first example comes from the recent law school graduates employed by Messrs. Gaffney and Schember, lead counsel in *Covington* and principals in the firm of Gaffney & Schember. For their time, the firm paid these graduates $11.00 per hour; billed clients at a rate of $40.00; and was awarded fees at a rate of $85.00. See J.A. (I)16, 18 & 226. The $85.00 rate awarded by the trial court plainly generated a windfall for the firm even if one makes the (implausible) assumption that the $40.00 rate it charged clients for their time just covered its costs for these employees. For example, if the recent law school graduates billed 2,000 hours in 1992 in successful fee-shifting litigation, they would have generated a profit of $90,000.00 for Gaffney & Schember, or $45,000.00 per partner.

The second example assumes that Messrs. Gaffney and Schember billed 35 hours per week for 48 weeks in 1992 (1,680 hours each); that half their practice was for paying clients at their highest hourly rate of $150.00; and that the other half was fully contingent litigation under federal fee-shifting statutes. The gross annual revenues generated by these attorneys from fee-paying clients would have been $252,000.00. Their fee-shifting litigation, assuming success and a court-awarded hourly rate of $260.00, would have generated gross revenues of $436,800.00, or $184,800.00 more than

their gross revenues from fee-paying clients. Presumably, moreover, these additional revenues would represent pure profit.

These examples illustrate three points. First, hourly rates based on the *Laffey* matrix to attorneys like those in this case -- which apply only when losing defendants are paying -- look just like contingency enhancements. Such enhancements are, however, barred by *Dague*; and they are no more permissible even when they are disguised as so-called market rates. Second, using the *Laffey* matrix to determine fee awards in the across-the-board fashion employed here is a legislative decision that skews the market for legal services. Third, the *Laffey* matrix results in awards that are unreasonably and unfairly high. Such rates cannot therefore be imposed when the public is responsible for picking up the bill.[4]

V. Tentative Proposed Standards.

The District tentatively proposes the following standards for implementing footnote 11 of *Blum*. An attorney's customary rate should presumptively be his or her reasonable hourly rate in federal fee-shifting litigation so long as that rate is within the range charged by attorneys of comparable experience, skill, and reputation in similar cases. If an attorney seeks a higher rate, he bears a heavy burden of establishing that his customary rate is truly a below-market rate, a burden that was not met in the cases before this Court. If an attorney's customary rate is higher than the rate charged by attorneys of comparable experience, skill, and reputation in similar cases, the lower rate presumptively should be awarded. This is consistent with market practices: purchasers of legal services seek the lowest price consistent with adequate representation. Or to paraphrase Judge Shadur in *Beard v. Teska, supra*, because cost-conscious consumers do not hire corporate merger specialists for their house closing, prevailing plaintiffs in federal fee-shifting litigation are not entitled to recover fees at premium rates in cases not demanding premium representation.

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[4]In *Covington*, for example, the merits litigation resulted in 1,729 compensable hours. See Pet. App. 47.

CONCLUSION

There is a square conflict among the Circuits over the legal standards that govern the setting of hourly rates under nearly 200 federal fee-shifting statutes. This is an important conflict that should be resolved by this Court to ensure that these federal laws are uniformly applied throughout the country and that the hard-pressed public is not forced to pay windfalls to attorneys.[5]

Respectfully submitted,

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[5]There is one final matter. Respondents suggest that the District waived any submarket argument below. Opp. 18 n.17. They are wrong. First, the District vigorously urged below that counsels' market rates could not exceed their customary rates because these were the rates they were able to command in the market and in line with the rates charged by comparable counsel in similar cases. Second, the D.C. Circuit acknowledged (and rejected) that argument: "Finally, the District argues that the court should define the relevant market . . . narrowly, as including only plaintiff attorneys in civil rights, employment, or discrimination actions." Pet. App. 20. Third, this Court has ruled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992). Here, the District properly presented the claim that the market rates for counsel here may not exceed their customary rates.